SUPREME COURT, U. S.
Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1084

FAY ANDERSON, *Petitioner*

v.

EARL J. LANGENWALTER, ET AL., *Respondents*

and

FAY ANDERSON, *Petitioner*

v.

CHARLES LINDSAY, JOHN JOINT, L. J. THELMAN and OTHER UNKNOWN NAMED AGENTS of the INTERNAL REVENUE SERVICE, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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February 28, 1975

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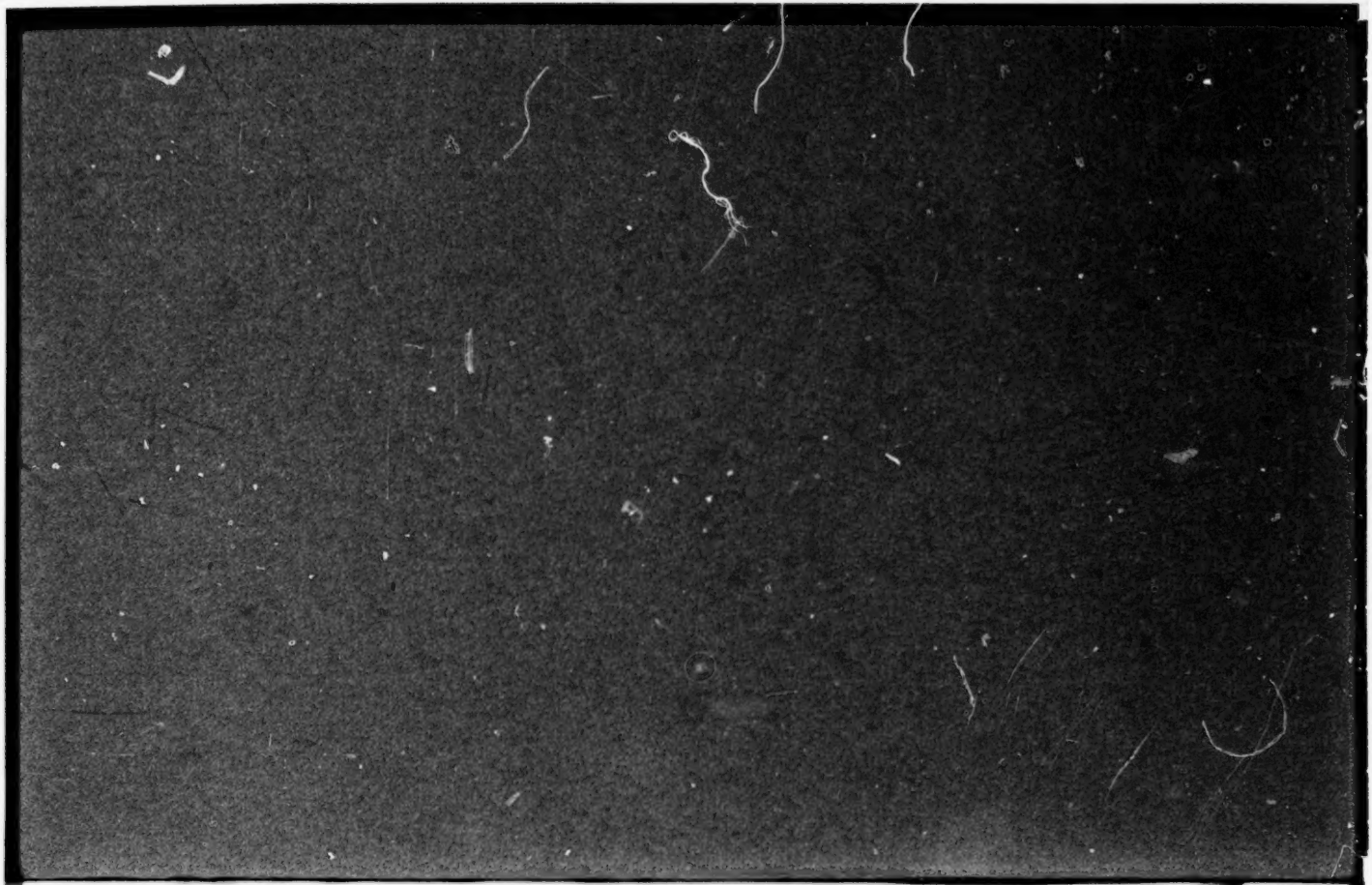

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IN THE

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OCTOBER TERM, 1975

No.

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CHARLES LINDSAY, JOHN JOINT, L. J. THEILMAN and OTHER UNKNOWN NAMED AGENTS of the INTERNAL REVENUE SERVICE,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Fay Anderson, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on December 30, 1974.

OPINION BELOW

The order of affirmance of the Court of Appeals appears in the Appendix hereto (page A1-2). The orders and judgments of the United States District Court for the Northern District of Iowa in these two consolidated cases are also included in the Appendix. (pages A3-10). There were no opinions written by either Court.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on December 30, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Do federal law enforcement agents have an unqualified immunity from personal liability for acts done in violation of the constitutional rights of a citizen, and if so, does the plaintiff have the burden of proving that the agents were not acting within the scope of their official duties?

STATUTORY PROVISIONS INVOLVED

U. S. Constitution

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty. or property, without due process of law; . . .

STATEMENT OF THE CASE

This petition involves two separate actions, consolidated in the Court below, in which the plaintiff, petitioner herein, is suing five individual Internal Revenue Service agents for illegal search and seizure, false arrest, false imprisonment, and other illegal and unconstitutional acts arising out of the arrest and unsuccessful criminal prosecution of plaintiff for the preparation of allegedly fraudulent income tax returns.

Two separate suits were filed on November 14, 1973, by plaintiff. The action against defendants Langenwalter and Archer was filed in the District Court of Iowa in and for Plymouth County and was removed by the defendants under the provisions of 28 U.S.C. 1442(a)(1). The action against the defendants Charles Lindsay, John Joint, L. J. Theilman et al. was filed on November 14, 1973 in the United States District Court for the Northern District of Iowa under the provisions of 28 U.S.C. 1331(a).

Plaintiff alleges that defendants Langenwalter and Archer, Internal Revenue agents, came separately into the office of plaintiff's tax and accounting firm on two different dates in February of 1973. These defendants used assumed names and an assumed set of facts, and posed as ordinary clients who requested that plaintiff prepare their income tax returns. Several weeks later defendant Lindsay and other federal agents appeared

in plaintiff's office without a search or arrest warrant and demanded the right to go through plaintiff's files. Defendant Lindsay advised plaintiff that he could not resist the seizure of the files, whereupon the revenue agents went through plaintiff's records and took a number of files into custody. (Complaint, par. 4).

On April 9, 1973 defendant Lindsay obtained an arrest warrant which was served on plaintiff on April 10, 1973 at which time plaintiff was arrested, handcuffed and led through his office past his staff and clients, and was interrogated, booked and taken before a federal magistrate. Plaintiff alleges that the arrest was without probable cause, that unreasonable force was used in making the arrest and that plaintiff was falsely imprisoned. (Complaint, par. 5). The plaintiff alleges that defendants notified the news media of the arrest adding to the humiliation, embarrassment and mental suffering of the plaintiff. (Complaint, par. 8). Thereafter at the probable cause hearing, the case was dismissed for lack of probable cause. (Complaint, par. 9). At this time, the IRS is still holding files taken from plaintiff's office and has refused to return them. (Complaint, par. 4, Count II, par. 3).

The defendants moved to dismiss in the Langenwalter and Archer case and moved to dismiss or for summary judgment in the case against Lindsay, et al., prior to discovery. In the Langenwalter and Archer case, the government submitted no evidence at all but denied jurisdiction, alleging that the case was an unconsented suit against the United States and that the defendants were officially immune. The District Judge granted the motion to dismiss in an order dated March 22, 1974 on the basis that defendants were officially immune, relying on a statement in defendants' brief

that they were acting within the scope of their employment. (Appendix, page A3-4).

In the case against Lindsay, et al., a motion to dismiss or for summary judgment was filed by defendants supported by an affidavit from defendant Lindsay. This affidavit, of a summary nature, stated that his actions were proper, and within his official duties, and alleging that the warrantless search was with plaintiff's consent.[1] Defendants also attached the later-obtained arrest warrant along with an unsworn, uncertified interoffice memo. This was the only evidentiary material submitted. The district court granted the Motion to Dismiss or For Summary Judgment again on official immunity grounds, and denied rehearing. (Appendix, page A6-11).

On appeal, the Court of Appeals issued a *per curiam* affirmance on the basis of the District Court's orders. (Appendix, page A1-2).

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decision of other Courts of Appeals, and at least in principle with those of this Court.

This case presents a conflict between two vital competing interests. In conflict are the rights of federal law enforcement agents to be free from the harassment of private law suits in the pursuit of their activities, and on the other side is the right of the private citizen to be free of unconstitutional action by federal agents.

---

[1] In the related criminal proceeding, before its dismissal, plaintiff submitted an affidavit stating that he had consented to the search only after defendants advised plaintiff that it would do no good to resist the search, as defendants would get the files anyway. Plaintiff, of course, was without counsel. The District Court, although requested by plaintiff to do so, refused to take judicial notice of its records containing this affidavit.

This case presents for decision the issue left open by this Court in *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971). In *Bivens,* this Court held that there is federal jurisdiction of a complaint alleging the violation of Fourth Amendment rights by federal agents. However, this Court remanded the *Bivens* case to the Second Circuit for consideration of the official immunity question, since that Court had denied jurisdiction without reaching the question of official immunity.

On remand, the Second Circuit held that the federal agents did not have absolute immunity but only a qualified immunity. *Bivens* v. *Six Unknown Named Agents, etc.,* 456 F.2d 1339 (2nd Cir. 1972).

That the federal agents do not have unqualified immunity has also been the position of at least three other circuits which have considered the issue. Besides the Second Circuit in *Bivens,* the D. C. Circuit and the Sixth Circuit have denied unqualified immunity to federal agents since *Bivens: Apton* v. *Wilson,* — U.S. App. D.C.—, 506 F.2d 83 (D.C. Cir. 1974); *Jones* v. *Perrigan,* 459 F.2d 81 (6th Cir. 1972). In addition, prior to the *Bivens* case the First Circuit had reached the same conclusion, *Kelley* v. *Dunne,* 344 F.2d 129 (1st Cir. 1965); and see *Hughes* v. *Johnson,* 305 F.2d 67 (9th Cir. 1962), where the Court held official immunity did not apply to a search by federal agents without a warrant, a more severe result.

The only other circuit court which appears to take the position of the Court below as to immunity is the Tenth Circuit in *Sowders* v. *Damron,* 457 F.2d 1182 (10th Cir. 1972), which was decided shortly after *Bivens.* In *Sowders* the Court does not directly dis-

cuss the issue but appears to accept absolute immunity if the agents are acting within the scope of their authority.

And see *Green* v. *James,* 473 F.2d 660 (9th Cir. 1973), where the Court in dicta says absolute immunity applies, but reversed summary judgment for defendants for the taking of further evidence as to the question of defendant's scope of employment; *Morgan* v. *Willingham,* 424 F.2d 200 (10th Cir., 1970) (immunity absolute but summary judgment not to be granted on basis of defendant's conclusory affidavits); U.S. ex rel *Moore* v. *Koelzer,* 457 F.2d 892 (3rd Cir. 1972).

This Court has recently concluded in *Scheur* v. *Rhodes,* 416 U.S. 232 (1974), that state officials have only a qualified immunity. In that case, which arose out of the Kent State disorders, this Court reversed the lower court's summary judgment for defendants in a unanimous opinion which stated at page 242:

> "For present purposes we need determine only whether there is an absolute immunity, as the Court of Appeals determined, governing the specific allegations of the complaint against the chief executive officer of a State, the senior and subordinate officers and enlisted personnel of that State's National Guard, and the president of a state-controlled university. If the immunity is qualified, not absolute, the scope of that immunity will necessarily be related to facts as yet not established either by affidavit, admissions, or a trial record."

That quotation sums up precisely the situation presented by this case respecting federal officials. At least one court of appeals, the D. C. Circuit, in an opinion by Judge Leventhal has read the *Scheur* v. *Rhodes* decision as authority for holding that federal officials, even

high ranking law enforcement officials, had no absolute immunity, only a qualified immunity. *Apton* v. *Wilson, supra.*

This important issue needs resolution by this Court at this time.

2. This is a case in which this Court should exercise its supervisory authority over the subordinate federal courts.

Aside from the vital importance of the issue presented, there is a second ground justifying the granting of this petition. This Court's Rule 19 recognizes the appropriateness of a grant of certiorari where the federal appellate decision "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." See Stern & Gressman, *Supreme Court Practice,* pp. 178-80 (BNA, 1969).

The allegations of the complaint must be read in the light most favorable to plaintiff since the complaints were dismissed on motion. *Conley* v. *Gibson,* 355 U.S. 41 (1957); cf. *Bivens, supra,* 403 U.S. at p. 389.

The Complaints in these two cases allege that various federal agents conducted an unconstitutional search of plaintiff's office without the aid of a search or arrest warrant, the seizure of plaintiff's files, violation of his right against self incrimination, arrest without probable cause, leading plaintiff from his office in handcuffs, and the wide public display without reasonable basis.[2]

[2] In addition, plaintiff can make a *prima facie* case that his home and office phones were tapped from the day after the search and seizure of his files until his arrest, and that he was kept under personal surveillance.

Even on summary judgment it is the moving party's burden, not only to show that there is no dispute as to material facts, but also to show that the facts are known. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 160-1 (1970); *Sartor* v. *Arkansas Gas Corp.*, 321 U.S. 620, 627 (1944); 6 *Moore's Federal Practice*, § 56.15[3] pg. 2335-2349 (2d Ed. 1974); Vol. 10, *Federal Practice and Procedure*, Wright & Miller § 2727, pg. 524-6 (1973).

Here the District Court not only impliedly rejected these basic rules of procedure, but went so far as to state that plaintiff had failed to disprove the statement in defendants' memorandum (sic) that defendants were acting in the scope of their employment. (Appendix, Page A3-4). Such handling is only encouraged when buried beneath a *per curiam* affirmance.

The decision of the Courts below means that the door which was opened in *Bivens* to actions against federal law enforcement agents for clear violations of a citizen's constitutional rights is immediately closed by the absolute immunity granted by the court. The procedures followed below are such a manifest departure from accepted legal standards as to call for an exercise of this Court's supervisory jurisdiction.

Several members of this Court in dissent in *Bivens* expressed understandable concern about an influx of meritless claims impacting upon the federal courts. The history of this case, we suggest, illustrates why only the most determined of plaintiffs will pursue such litigation. But as Mr. Justice Harlan stated in his concurrence in *Bivens, supra,* at page 411 "Although litigants may not often choose to seek relief, it is important, in a civilized society, that the judicial branch

of the Nation's government stand ready to afford a remedy in these circumstances.[3]

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Eighth Circuit.

Respectfully submitted,

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February 28, 1975

[3] In view of this Court's recent decision in *Scheur* v. *Rhodes*, *supra*, and the record presented here, we respectfully suggest that it would be appropriate to remand this case for further consideration in light of *Scheur* v. *Rhodes*.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 74-1496 and 74-1515

74-1496

FAY ANDERSON, *Appellant,*

v.

EARL J. LANGENWALTER, ET AL., *Appellees.*

74-1515

FAY ANDERSON, *Appellant,*

v.

CHARLES LINDAY, JOHN JOINT, L. J. THIELMAN, and Other Unknown Named Agents of the Internal Revenue Service, *Appellees.*

Appeals from the United States District Court for the Northern District of Iowa.

Submitted: December 13, 1974.

Filed: December 30, 1974.

Before LAY and BRIGHT, Circuit Judges, and TALBOT SMITH, Senior District Judge.*

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* TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation.

Order of Affirmance

This is a consolidated appeal from summary judgments entered in favor of the defendants in two damage actions brought by Fay Anderson in the United States District Court for the Northern District of Iowa. Mr. Anderson sought damages from the defendants, all Internal Revenue Service agents, for what he alleged to be a wrongful search,

arrest and prosecution. We have carefully reviewed the record and the briefs. We find the decisions of the district court should be affirmed for the reasons set forth in the district court's opinions. *See* Rule 14 of the Rules of this Court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[To be printed but not published.]

(Filed March 22, 1974)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. 73-C-3085-W

FAY ANDERSON, *Plaintiff*,

v.

EARL J. LANGENWALTER and DONALD E. ARCHER,
Defendants.

Order

This matter is before the court on defendants' resisted motion to dismiss or for summary judgment filed January 14, 1974.

In this action for damages for alleged violation of his constitutional rights and his mental suffering attendant thereto, plaintiff contends that defendants, Internal Revenue Service agents, falsely induced him through the use of aliases and false facts and information to prepare false income tax returns.

Defendants seek dismissal or summary judgment on three grounds: (1) failure to state a claim upon which relief can be granted; (2) defendants are immune from suit since they were at all times acting within the scope of their duties and in good faith; and (3) sovereign immunity and the provisions of 28 USC 2201, 2680(a), (c), (h) and (i).

Plaintiff resists contending that he has adequately stated a cause of action and defendants are not immune from suit since they acted outside the scope of their duties.

Government agents such as defendants are immune from suit where they have acted within the scope of their authorized duties. See *Barr* v. *Mateo*, 360 U.S. 564, 571-76 (1959); *Sowders* v. *Damron*, 457 F.2d 1182, 1184-86 (10th Cir. 1972); *Ahlstrand* v. *Lethert*, 319 F.Supp. 283, 284 (D. Minn. 1970).

In their memorandum in support of their motion, defendants state that the use of aliases and false information in order to ferret out preparers of false income tax returns is an investigative technique used by the Internal Revenue Service. Based upon this statement and the fact that plaintiff's complaint does not allege that defendants acted beyond the scope of their duties, and in view of plaintiff's failure to present any facts or evidence indicating that defendants acted outside the scope of their duties, it is the court's view that plaintiff has failed to state a cause of action and this action should be dismissed pursuant to Rule 12(b)(6), FRCP. *See Ahlstrand* v. *Lethert, supra,* at 284.

It is therefore

ORDERED.

Dismissed.

March 21, 1974.

/s/ EDWARD J. MCMANUS
Edward J. McManus, *Chief Judge*
United States District Court

(Filed March 22, 1974)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

Civil Action File No. 73-C-3085-W

FAY ANDERSON, *Plaintiff*,

v.

EARL J. LANGENWALTER and DONALD E. ARCHER,
Defendants.

Judgment

This action came on for hearing before the Court, Honorable Edward J. McManus, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged

That the plaintiff take nothing, that the action be dismissed on the merits, and that the defendants, EARL J. LANGENWALTER and DONALD E. ARCHER, recover of the plaintiff, Fay Anderson, their costs of action.

Dated at Sioux City, Iowa, this 22nd day of March, 1974.

K. W. FUELLING
Clerk of Court

By /s/ D. HENRY
Deputy Clerk

(Filed March 6, 1974)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. 73-C-3079-W

FAY ANDERSON, *Plaintiff*,

v.

CHARLES LINDSAY, JOHN JOINT, L. J. THEILMAN and other unknown named agents of the Internal Revenue Service, *Defendants*.

Order

This matter is before the court on defendants' resisted motions to dismiss or for summary judgment filed February 11, 1974.

Plaintiff, an income tax return preparer, seeks to recover from defendants, Internal Revenue Agents, for their alleged illegal search and seizure of his files, his illegal arrest and the conversion of his property.

In their motions, supported by defendant Lindsay's affidavit and various exhibits, defendants contend that (1) the complaint fails to state a claim upon which relief can be granted; (2) the defendants are immune from suit since they at all times alleged in the complaint were acting within the scope of their duties and in good faith; and (3) this action is barred by sovereign immunity and the provisions of 28 USC §§ 2201 and 2680(a), (c), (h) and (i).

In resistance, plaintiff has submitted a brief that deals only with the facts of another case which he has pending in this court.

From the affidavit and exhibits submitted by defendants the following facts appear: Pursuant to an investigation of plaintiff for income tax violations, defendant Lindsay

went to plaintiff's office and requested to examine all tax returns prepared by plaintiff for 1972. Although plaintiff was advised of his right to refuse disclosure, he told defendant Lindsay he could examine any of his files and take any that were desired, whereupon plaintiff's files were examined and certain files were taken and receipted for. Approximately two weeks later plaintiff was arrested by defendant Lindsay pursuant to an arrest warrant issued by a United States Magistrate.

Summary judgment pursuant to Rule 56, FRCP, is appropriate where there are no genuine fact questions remaining for trial. Although the movant for summary judgment has the initial burden of establishing that there is no genuine issue of material fact, when he has presented sufficient evidence to support his entitlement to a judgment the burden of coming forth with specific controverting facts shifts to the other party. *See George* v. *Hillman Transp. Co.*, 340 F.Supp. 296, 298-99 (W.D. Pa. 1972); *Prettner* v. *Aston*, 339 F.Supp. 273, 283-84 (D. Del. 1972).

Although there is conflicting authority as to whether government agents such as defendants enjoy absolute immunity or only a qualified immunity from suit, it is clear that they are immune where they have acted in good faith within the scope of their authorized duties. *See Barr* v. *Matteo*, 360 U.S. 564, 571-76 (1959); *Sowders* v. *Damron*, 457 F.2d 1182, 1184-86 (10th Cir. 1972); *Bridges* v. *Internal Revenue Service*, 433 F.2d 299, 300 (5th Cir. 1970); *Burton* v. *Peartree*, 326 F.Supp. 755, 761 (E.D. Pa. 1971); *Ahlstrand* v. *Lethert*, 319 F.Supp. 283, 284 (D. Minn. 1970).

From the affidavit and exhibits submitted by defendants, it appears that defendants' search and seizure of plaintiff's files and his subsequent arrest were all done within the scope of their duties and in good faith. Accordingly, in view of plaintiff's failure to controvert the evidence presented by defendants indicating that they were acting at

all times relevant within the scope of their authority and duties, it is the court's view that there is no genuine material fact issue as to whether defendants were acting within the scope of their duties in good faith and summary judgment should be entered in favor of defendants.

It is therefore

ORDERED

Dismissed.

March 5, 1974.

/s/ EDWARD J. MCMANUS
Edward J. McManus, *Chief Judge*
United States District Court

(Filed March 7, 1974)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

Civil Action File No. 73-C-3079-W

FAY ANDERSON, *Plaintiff*,

v.

CHARLES LINDSAY, JOHN JOINT, L. J. THEILMAN and other unknown named agents of the Internal Revenue Service, *Defendants.*

Judgment

This action came on for hearing before the Court, Honorable Edward J. McManus, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged

That the plaintiff take nothing, that the action be dismissed on the merits, and that the defendants, Charles

Lindsay, et al, recover of the plaintiff, Fay Anderson, their costs of action.

Dated at Sioux City, Iowa, this 7th day of March, 1974.

K. W. FUELLING
Clerk of Court

By /s/ D. HENRY
Deputy Clerk

Copies of this Judgment mailed on 3-7-14 to:

George T. Qualley, PC, 220 Badgerow Bldg., Sioux City, Iowa.

Gary E. Wenell, Asst. U.S. Attorney, Sioux City, Iowa.

John P. Hines, Trial Attorney, Tax Division, Department of Justice, Washington, D. C. 20530.

(Filed April 16, 1974)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. 73-C-3079-W

FAY ANDERSON, *Plaintiff*,

v.

CHARLES LINDSAY, JOHN JOINT, L. J. THEILMAN and other unknown named agents of the Internal Revenue Service, *Defendants*.

Order

This matter is before the court on plaintiff's resisted motion to set aside the dismissal of this action entered March 6, 1974.

In support of his motion, plaintiff contends that genuine fact questions still exist and the court erred in holding that he failed to controvert the evidence presented by defendants. Specifically, plaintiff alleges that the affidavit he submitted in a criminal proceeding before a U.S. Magis-

trate in Sioux City, Iowa shows that defendants illegally searched and seized his files and illegally arrested him.

In resistance, the Government contends that the court was correct in holding defendants to be immune since they were acting within the scope of their duties. The government further states that the objections plaintiff raises relate only to the admissibility of evidence in criminal proceedings.

Upon reviewing the entire record, it is the court's view that its ruling dismissing this action was correct and should not be disturbed. Initially, plaintiff still has not submitted any evidence in support of his allegations and the court is not required to take judicial notice of proceedings in other cases in this court.[1] *See Guam Investment Co.* v. *Central Bldg., Inc.*, 288 F.2d 19, 23 (9th Cir. 1961); *Funk* v. *Commissioner of Internal Revenue*, 163 F.2d 796, 800-01 (3rd Cir. 1947). In any event, the court is of the view that the arrest warrant and other materials submitted by defendants clearly establish that they acted within the scope of their duties and thus are immune from suit. *See Sowders* v. *Damron*, 457 F.2d 1182, 1184-85 (10th Cir. 1972).

It is therefore

ORDERED

Denied.

April 12, 1974.

/s/ EDWARD J. MCMANUS
Edward J. McManus, *Chief Judge*
United States District Court

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[1] The court is reluctant to set aside the dismissal in view of plaintiff's continued failure to comply with Local Rule 16(F) which provides, in part:

> "If the motion requires the consideration of facts not appearing of record, he shall also . . . file copies of all . . . documentary evidence which he intends to submit in opposition to the motion. . . ."